

ESTATE OF ARNOLD ROSS

IBIA 76-TQ-1

Decided December 21, 1976

Appeal from an Order denying petition for reopening.

Affirmed and Dismissed.

1. Indian Probate: Wills: Testamentary Capacity: Alcohol

Testimony of physician, based on his treatment and observation of testator at various times, to the effect that testator may have suffered permanent brain damage and disease but which is inconclusive as to whether testator had testamentary capacity does not support a finding of testamentary incapacity when the scrivener and other witnesses testified that from their conversations with and observations of testator at and/or about the time the will was executed they believed him to be sober, alert and in all respects competent to make a will.

2. Indian Probate: Wills: Undue Influence: Failure to Establish, Generally

Undue influence will not be presumed where the evidence affirmatively discloses that the beneficiary of a will who accompanied the testator to the office of the scrivener was not present when the terms of the will were discussed or when the will was executed.

3. Indian Probate: Wills: Undue Influence: Failure to Establish, Opportunity

The mere fact that a beneficiary in a will or other grandchildren were in a position to exert undue influence on the testator is insufficient to establish the invalidity of the will, when convincing proof that the beneficiary or others actually exerted undue influence is lacking.

APPEARANCES: Cynthia Davenport and Alan C. Stay, Attorneys at Law, Small Tribes Organization of Western Washington, for Appellant; Jon Ostlund, Esq., for Appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

Decedent, Arnold Ross, an unallotted Lummi Indian died May 11, 1974, having executed a will on January 16, 1974, devising his entire estate to his granddaughter, Dorothy Baker, thereby disinheriting his surviving spouse, Esther Ross, an enrolled Stillaguamish Indian.

Hearings were held at Bellingham, Washington, on January 24, September 24, and December 11, 1975, after which Administrative Law Judge Robert C. Snashall issued an Order approving said will.

The surviving spouse petitioned for rehearing, which petition was denied.

The appeal to this Board rests essentially on the following grounds:

- 1) Competency of Decedent to Execute the Will of January 16, 1974, not supported by substantial evidence.
- 2) Undue influence exerted on decedent to execute said will by grandchildren.
- 3) Appellant did not receive a fair hearing because of Administrative Law Judge's bias.
- 4) The home acquired by decedent and surviving spouse, Esther Ross, under the H.I.P. program was not trust property.

Consideration has been given to the complete record, including contentions and arguments of appellant and appellee.

We find the contentions made by the appellant to be without merit. We further find that appellant was afforded a full, fair and impartial hearing.

We find the two-bedroom frame house on post foundation, with composition roof granted to decedent and Esther Ross constructed under the Housing Improvement Program, to be non-trust personal property. The house presently stands on trust property of the decedent located at 1031 Cagey Road, Bellingham, Washington, also referred to as SE 1/4 NW 1/4 NW 1/4, sec. 25, T. 38 N., R. 1 E., W.M., Washington.

Jon E. Ostlund, counsel for appellee, filed a claim for attorney fees pursuant to 43 CFR 4.281 in the sum of \$2,522.15. The claim included a sworn itemization of the time and material expended. We agree that the claim is valid and reasonable and find that counsel is entitled to attorney fees in the sum of \$2,522.15.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order Approving Will and Decree of Distribution dated February 13, 1976 (not including house referred to, supra, which is non-trust property) is AFFIRMED, the claim of Jon E. Ostlund for attorney fees in the sum of \$2,522.15 is ALLOWED, and the appeal is hereby DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

Mitchell J. Sabagh
Administrative Judge

We concur:

Alexander H. Wilson
Administrative Judge

Wm. Philip Horton
Administrative Judge